OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM GC 09-06 **April 20, 2009**

TO: All Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Report on the Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section

The Board and I attended the Annual Midwinter meeting of the Practice and Procedure Committee (P & P Committee) of the ABA of the Labor and Employment Law Section from March 4 through 7, 2009. The primary purpose of this meeting is to discuss and respond to Committee concerns and questions about Agency casehandling processes. As is the practice, I provided responses to questions that the Committee had submitted earlier in the year. It is important that you and your staffs be aware of the concerns of the organized bar at the National level and of my thinking on these issues, so as I have done in the past, I am sharing my responses with you. While we did not have time to respond to every question raised at the meeting, we have included all the questions posed and our proposed responses. The statistics are current as of the time of the meeting.

While the primary purpose of the meeting is to deal with the institutional concerns of the P&P Committee, this meeting also provides an opportunity for individual practitioners to communicate their thoughts about the operations of the Office of the General Counsel and the Field operations in particular. Consistent with my experience in the Mid-Winter meetings conducted in 2006, 2007 and 2008, I was very gratified by the positive comments of the practitioners at the meeting. They uniformly applauded the professionalism and dedication of the Agency staff with whom they regularly deal. These comments serve to confirm the assessments of the work of the staffs in the Field and Headquarters I have gained through casehandling and performance reviews. They reinforce my pride in serving with you.

Thank you all for all of your fine efforts.

/s/
R.M.

Attachment

cc: NLRBU
Release to the Public

1. Ques: The Committee is interested in a detailed Regional status report on the First Contract Bargaining initiative and its implementation. For example, since the inception of the initiative in April 2006, how many Section 8(a)(5) charges were filed in first contract situations. How many were found to have merit. In the merit cases, how many settled? Were any of the special remedies described in the General Counsel Memoranda part of the settlement? How many such cases have gone to trial? Are there any ALJ decisions in which special remedies have been ordered? Are any first contract bargaining cases involving special remedies currently before the Board? What efforts have been made to determine whether a first contract has been achieved in settled cases?

Ans: The answer to this question is summarized by the following chart:

FY	# Bad Faith Bargaining 8(a)(5) Initial Contract Cases	# Bad Faith Bargaining 8(a)(5) All Contract Cases	% Initial Contracts	# Initial Contract Merit Cases	Initial Contract Merit Rate	# All Contract Merit Cases	All Contracts Merit Rate	# Initial Contract Cases Resulting in Settlement of Adjustment	Initial Contract Settlement Rate	# All Contract Cases Resulting in Settlement of Adjustment	All Contract Settlement Rate
2006	372	1,572	23.66%	170	45.70%	713	45.36%	140	82.35%	642	90.04%
2007	343	1,431	23.97%	164	47.81%	641	44.79%	143	87.20%	588	91.73%
2008	264	1,323	19.95%	119	45.08%	589	44.52%	95	79.83%	513	87.10%
Total	**979**	**4,326**	**22.63%**	**453**	**46.27%**	**1,943**	**44.91%**	**378**	**83.44%**	**1743**	**89.71%**

In addition, we advised that special remedies described in the General Counsel memoranda were authorized in 13 cases in fiscal year 2008. Of these cases, ten settled and three went to trial. Of the litigated cases, one case is pending before the ALJ; one case is pending before the Board after the ALJ granted the special remedy; and a Board default decision, ordering a special remedy, issued in another case. The Agency has been informally contacting Regional Offices to determine whether a first contract was achieved in FY 2008 settled cases. Of the ten FY 2008 settled cases, four cases resulted in contracts. In three cases, the parties were still bargaining, and in three cases, bargaining had ceased due to changed circumstances (e.g., facility closed).

2. Ques: At our December 11th meeting in Washington, comments were made by Agency officials regarding sharing "certification" data with FMCS regarding tracking of first contract bargaining by that agency. Please provide information about this process, and what, if any efforts are being made to coordinate the GC's first contract initiative with FMCS.

Ans: Each month, the Agency sends FMCS a spreadsheet listing all RC cases in which the Agency issued Certifications of Representative during the previous month. The spreadsheet contains the following information:

Case Number
Case Name
Date Certification of Representative Issued
Description of the Bargaining Unit involved
Certified Bargaining Representative
Employer
Contact Information (Address, Telephone, etc.) for all Participants in Election

FMCS supplies this information to its staff of mediators, who contact the parties offering assistance in collective bargaining.

3. Ques: What is the latest information provided to the Regions with regard to implementing the *Dana* decision? What has been the budgetary impact of this decision? When a *Dana* notice is requested, what is the average turn-around time in the various Regions? How are the Regions dealing with foreign language issues vis-à-vis the notices? What methods are the Regions using for providing notices via e-mail, regular mail, etc.? Does the Agency police the adequacy of the posting? How many petitions have been filed following the posting of a *Dana* notice? How many elections have occurred and what have been the results? (The most current data would be appreciated.) Since *Dana*, what is the Agency's experience with challenges to the validity of a contract bar? Have any such cases been decided; are any pending?

Ans: The Regions received information about implementing the *Dana* decision in OM 08-07, which issued on October 22, 2007.

In May 2008 we sent out an e-mail to all Regions which addressed some questions that had come up regarding the processing of *Dana* cases. The email addressed two issues: (1) whether the Region should issue a closing letter and (2) whether the 45 day posting period should be extended when 2 of 8 involved facilities did not post notices until some time after the other 6 facilities had posted. We answered the first question by noting that the closing of a *Dana* file is a purely internal administrative matter and no "formal" closing letter should issue. The second issue was one which we felt should be resolved by the parties. However, we indicated that, in our view, the safest route would be for the Employer to post the notice for the 2 affected facilities a full 45 days from the posting of the corrected notices at the facilities that posted late.

The Agency does not separate the costs associated with implementing the *Dana* decision so there is no definitive information available to answer this question.

According to the most recent figures available, the average turn-around time for providing notices in response to a request is 5 days. (In computing this figure the number 0 was used for occasions when Regions were able to provide notices on

the date when the request was received.) The median figure for providing notices is 3 days.

The Agency does not formally police the adequacy of a *Dana* notice posting.

As of the end of February 2009, the Agency had received 612 requests for *Dana* notices. In connection with those requests for notices, the Agency had received 55 petitions. Of that total, in 32 instances the petitions resulted in an election; in 12 instances the petitions were withdrawn; in 4 instances the petitions were dismissed; and there are 3 pending petitions.

The results of the 32 elections held show that the voluntarily recognized union prevailed in 23 elections and in 9 elections the employees voted against continued representation by the voluntarily recognized union. In two of the losses, the voluntarily recognized union was defeated by a petitioning union.

Since the issuance of the *Dana* decision, the Board has not issued any decisions relating to the validity of a contract bar (or recognition bar) in circumstances that implicated a *Dana* notice posting.

4. Ques: Please provide a status report on the litigation currently pending in the circuits regarding the "authority" of the 2-member Board. What contingency plans has the Agency made for an adverse ruling on this issue? If any decisions issue by the Mid-winter meeting, please provide a listing of affected cases.

Ans: At the time of the meeting with the ABA there were 19 cases pending in the courts of appeals in which a party challenged the authority of the two-member Board, or in which a court raised the issue *sua sponte*.

The issue had been raised by parties in 14 cases in 6 different circuits. It had been fully briefed and argued in the D.C. and First Circuits, fully briefed but not yet argued in the Second and Eighth Circuits, partially briefed in the Seventh Circuit, and awaiting briefing in the Third Circuit. Five cases in which the issue has not been raised have been held in abeyance, *sua* sponte, by the D.C. Circuit, pending disposition of *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, the lead case on the issue in that court. In the event of an adverse decision, the Agency will review the scope and rationale of the decision and consider all available options.

Note: Since the Mid-Winter meeting, the Board received a favorable decision in the First Circuit. *Northwestern Land Services LTD v.* _____ *NLRB* F.3d ____, 2009 WL638249 (1st Cir. 2009).

5. Ques: Concerns were also raised regarding the inability of a charging party to present rebuttal evidence or the inability of a charged party to respond to new allegations during the investigation stage, in part because of the pressures of time targets. What steps are taken to ensure that cases are investigated promptly and with due regard to providing the parties sufficient time to respond to issues raised during the investigation? A number of practitioners expressed frustration with situations in which there is little or no investigatory activity, but they are then pressed for submissions on an expedited basis to meet "end of the month" deadlines. Has the GC received complaints regarding such practices, and, if so, what steps are being or can be taken to correct this problem?

Ans: The timeline for an investigation should provide ample time for a charged party to respond to investigative inquiries. Having said that, we have from time to time received complaints of this nature.

The time targets set for completion of investigations are based on the Agency goals for resolving cases. The time targets contemplate that Regions will provide adequate time to charging parties to present evidence in support of the charge and to charged parties to respond to the allegations contained in the charge. Occasionally Board agents and the parties will differ with respect to the definition of "adequate time." Our experience, however, is that Regional personnel and the representatives who practice with the Regions typically establish professional, business-like relationships enabling the Agency to investigate and resolve cases promptly. Moreover, requests from practitioners for extensions of time to present evidence usually are resolved with the Board agent in a mutually satisfactory manner.

If a party or representative is unable to resolve an issue concerning the deadline for presentation of evidence, he or she should contact the Regional Director. If that exchange is not satisfactory, the party or representative may contact the Division of Operations-Management. Finally, we noted that the time lines followed by Regions during investigations is one element examined in the review of case files during the Quality Reviews regularly conducted of closed cases.

6. Ques: Parties increasingly communicate with the Agency via email. Is there a procedure in place to deal with the inadvertent disclosure of information to non-parties or unintended recipients (e.g., "reply all" email errors)? Is there a "clawback" policy in place? Does the Agency refrain from using inadvertently disclosed information or has it considered adopting a rule similar to the recently revised Federal Rule of Evidence 502?

Ans: A clawback policy involves a procedure by which a party will produce evidence, generally electronically stored information, to another party, usually in discovery, with the understanding that inadvertently produced privileged

information (e.g., attorney work product or attorney-client privileged information) will be returned within a reasonable period of its discovery. As there are no discovery procedures in normal NLRB proceedings, the Agency does not have a discovery clawback policy.

Although there are no formal Agency procedures to deal with the inadvertent receipt of privileged or other legally protected information, when this issue arises, Regional Offices have been directed to immediately contact the Agency's Special Ethics Counsel for guidance in order to protect the integrity of the Board's proceeding and ensure that there is no violation of ethical rules. After appropriate research, Regions receive advice on how to proceed based on all the circumstances in the case.

7. Ques: How does the Agency deal with subpoenas for electronic documents? Does the agency have any rules or policies regarding the retention of electronic data? Are there protocols in place for email storage and searches? Is there a general document retention/destruction policy, is it available, and if so may we please have a copy?

Ans: The Agency has issued two memoranda regarding the retention and storage of electronic documents, neither of which has been made available to the public. GC Memo 07-09 (June 2007) discusses the recent amendments to the Federal Rules of Civil Procedure that impose new requirements and procedures for the discovery of electronically stored information; provides general guidelines for identifying and preserving electronically stored information; and discusses various forms of production for electronically stored information. OM Memo 07-64 (June 2007) discusses the impact of E-Discovery on Regional Offices. The memorandum discusses policies and specific procedures regarding records retention, records storage and litigation holds relating to all Regional Office electronic records, including most notably casehandling records.

8. Ques: Does the General Counsel have a general "lack of corroboration" policy? If so, to what extent has it been guided by a Task Force determination, and what factors informed that determination? What is the practice when a charging party's allegations are supported by only a single sworn witness affidavit and the charged party presents conflicting testimony by one or more witnesses? Are such charges routinely dismissed? Should they be? Is the severity of the alleged violation (such as a physical assault and threat to kill) a factor in permitting a charge to go forward and similarly allowing an ALJ to resolve the credibility dispute? Are charged parties routinely advised of credibility issues which may affect the Region's decision so they can respond?

Ans: As set forth in the Unfair Labor Practice Casehandling Manual, Section 10064, Regional Offices are expected to resolve factual conflicts based upon compelling documentary evidence and/or an objective analysis of the inherent

probabilities in light of the totality of the relevant evidence. The fact that the charging party's allegations are supported by only one witness affidavit and the charged party presents conflicting testimony by more than one witness is only one factor to be considered by the Regional Office. The seriousness of the alleged conduct is also a factor in assessing a case.

If the Regional Office is unable to resolve credibility conflicts on the basis of objective evidence regarding matters that would affect the merit determination, a complaint should generally issue, absent settlement. Parties are of course advised of the issues being investigated.

9. Ques: In the rare case when a practitioner raises concerns of potential bias by an investigator, and it is acknowledged that the investigator departed from normal procedures in a prior case, is there a policy for transferring the case to a new investigator? Are there circumstances in which the "perception" of bias may result in a case being transferred to another Region?

Ans: When there are concerns of potential bias by a Board agent and it is acknowledged that the Board agent "departed from normal procedures" in a prior case, the Regional Office will look at the nature of the conduct. A departure from normal casehandling procedures does not, of course, necessarily warrant a finding of bias. If in the view of the Regional Director the conduct was sufficiently serious so as to raise the concern of potential bias, or the perception of bias, the Regional Director has the authority to transfer the case to another Board agent.

On rare occasions, a perception of bias may result in a case being transferred to another Region. An example would be where a witness is a very close relative of a Regional Office employee. When a case is transferred for this reason, the second Region supervises the investigation, decides the merits of the charge and supervises the litigation if necessary. Depending upon the circumstances, however, the investigator could be a Board agent from the initial Region, who is assigned for that case to the supervising Region.

10. Ques: What are the Agency's current policies and practices with regard to telephone affidavits?

Ans: Face-to-face affidavits remain the keystone of NLRB investigations. In order to use our limited resources most effectively, however, the Agency continues to take telephone affidavits in certain circumstances.

Memorandum GC 02-02, "Impact Analysis Program Modifications," (December 6, 2001), sets forth general guidelines for using telephone affidavits and other alternative investigation techniques. Pursuant to Memorandum GC 02-02, Regional Offices may utilize alternative techniques for all Category I cases and continue to use them for certain Category II cases, such as a Section 8(a)(5) or

8(b)(3) request for information or Section 8(b)(1)(A) duty of fair representation cases. Additionally, Regional Directors continue to have the discretion to use these techniques for other Category III and II cases in certain circumstances. This includes cases involving significant travel expense and in which the affidavit is a supplemental statement, where individuals are providing evidence that corroborates evidence presented in a face-to-face affidavit or where there is a very high probability that the case has no merit.

11. Ques: What is the status of the language specialist program in the Regions? Practitioners once again raised concerns about the quality of translations, particularly at the witness statement stage. There is a perception that the Regions rely on its Spanish-speaking staff to translate statements from charging parties; whereas, professional translators are retained for all other languages. Given the great variations in dialect, syntax and meaning between and among Spanish speakers, should professional translators be retained for *all* charging party statements?

Ans: It is the policy of the Agency, when obtaining sworn Board affidavits, to provide affiants with appropriate interpreter assistance when warranted. In Regional Offices that have a sufficient need, we employ either a language specialist, who performs translation assistance full time, or a language assistant, who also has some support staff responsibilities. Both language specialists and language assistants are capable of performing translations. Bilingual Board agents will also perform translation duties when the need arises. Although most of our bilingual Board agents are fluent in Spanish, we do have Board agents who are fluent in other languages.

Besides being cost prohibitive, we have no basis for concluding that using outside interpreters for all charging party statements would improve the translations. We are unaware of any problems that have arisen as a result of inaccurate translations by our Board agents, language specialists or language assistants. Moreover, on occasion we have received complaints about the translations provided by outside interpreters at hearings.

12. Ques: What directions are the Regions provided regarding seeking information from charged parties and what steps are the Regions taking to ensure that both charging and charged parties are provided sufficient, credible evidence to defend charges or to rebut evidence? Practitioners reported that some Regions send the charged party a letter outlining all the facts and evidence in support of the Region's prima facie case. Other Regions seek information from the charged party on a piecemeal basis, adding to the expense in responding. Is there a uniform Agency policy regarding the inclusion of specific evidence and factual support in the Equal Access to Justice Act (EAJA) letters sent to charged parties?

Ans: Sections 10052.5 and 10054.4 of the Unfair Labor Practice Casehandling

Manual provides guidance with respect to the Board agent's initial contact with the charged parties.

13. **Ques: What are the current statistics, by Region regarding the use of investigative subpoenas and in what circumstances are they utilized? What is the enforcement rate for investigative subpoenas? How often does the use of an investigative subpoena result in the dismissal of charges? What is the practice of notifying counsel for a third party when a subpoena is sought from that party? What guidelines do Regions follow for document production responsive to an investigative subpoena, especially in those instances in which a large volume of documents are produced? Are these records reviewed at the facility of the party producing them or is that party required to copy the files and transmit them to the Regional Office?**

Ans: In FY 2008 there were 22,501 unfair labor practice cases filed, and investigative subpoenas issued in 586 (2.6%) of them. During FY 2008, in cases involving the issuance of an investigative subpoena, merit (in whole or in part) determinations were reached in 53% of the cases and non-merit determinations were reached in 47% of the cases. The merit rate for all cases in 2008 was 38.2%.

During FY 2008 Regions received seven district court decisions in actions filed to enforce investigative subpoenas. The Regions prevailed in all seven cases. In one instance, the district court decision enforcing the subpoena was affirmed on appeal.

The Board received 48 petitions to revoke investigative subpoenas during FY 2008. The Board denied the petitions to revoke on 39 occasions and granted the petition in part on two occasions. The other 7 petitions were resolved without the necessity of a Board ruling.

When an investigative subpoena is served on a third-party witness who is represented by counsel, the Agency's practice is to give notice to that counsel concerning the service of the subpoena.

Regions are sensitive about the burdens placed on a party who is required to produce a large volume of documents and most subpoenas duces tecum issued by Regions include an "in lieu of" provision that allows the subpoenaed party to provide a summary of what the subpoenaed records would show in lieu of providing the records, subject to the Region being allowed to examine the records underlying the summary. If a party believes that complying with a subpoena would be unduly burdensome, that party should discuss its concerns with the Board agent or, if necessary, Regional management.

14. **Ques: The Committee would appreciate a general status report on the GC's**

policies and practices concerning the deferral of unfair labor practice charges to a grievance-arbitration procedure. In particular, please provide an explanation of the circumstances giving rise to Memorandum 08-74 and the experience to date in complying with the Memorandum. For example, how many charges, that otherwise would have been deferred to arbitration, have been investigated and dismissed thereby unblocking election? Do the Regions have any discretion in these matters? How many cases have been referred to the Division of Advice pursuant to the Memorandum? What are the current statistics on pending deferred cases? For how long, on average, have these cases been pending? Has the GC directed the Regions to push parties to proceed to arbitration or withdraw the charges? What is the current policy on requesting status updates from the parties? Other than in blocking charge cases addressed in OM 08-74, has the GC given any consideration to having the Regions proceed to investigate charges that have been deferred for a significant period of time? How long, for example, should a charging party be required to await the outcome of an arbitration concerning a matter in which an "arguable violation" has occurred?

Ans: As indicated in OM 08-74, that memo issued when we became aware of some variations in how some Regions handled Collyer and blocking charges.

During the three year period from October 2005 through September 2008, 23 R cases were actually blocked by deferred ULP charges. No cases have been referred to Advice on this issue since the OM issued in September 2008.

As of January 2009, there were 2182 cases pending *Collyer* or *Dubo* deferral. Nearly 85% of all deferred cases are resolved within two years of the decision to defer.

Year deferred	Number of Pending Deferred cases	**% of all deferrals**
2008	1362	62.4
2007	488	22.4
2006	181	8.3
2005	62	2.8
2004	29	1.3
2003	30	1.4
2002	13	.6
2001	8	.4
2000	4	.2
1998	2	.08
1997	1	.04
1995	2	.08

As set forth in the Case Handling Manual 10118.5 *Periodic Review of Status of*

Deferred Cases, the regional offices inquire into the status of the underlying grievance/arbitration proceedings on a quarterly basis.

OM 09-06 (10/7/08) *Collyer* and *Dubo* Deferral Survey, directs the regional offices to provide Operations-Management with information concerning the status of all cases pending deferral for more than 12 months. We are currently reviewing the results of this survey.

Note: The five cases pending since at least 1998 have been carefully scruitimized and we are satisfied, as are the parties with the length of time these matters have been deferred.

15. Ques: Several participating Regional Directors commented that they had seen an increase in the number of charges filed over "confidentiality" provisions in Employment Handbooks that arguably restricted employees' freedom to discuss wages and benefits. Is the GC aware of these cases and is there any plan to address this issue?

Ans: We know that this issue continues to arise in cases and Agency staff will often discuss the law on this point before groups of employers and employer representatives in order to alert employers to the law.

16. Ques: Questions were raised about the process for achieving settlements and the various remedies sought in settlement agreements. A number of practitioners expressed the view that Regions appear to be departing from past practice and obtaining the charged party's agreement before presenting the agreement of the charging party? Is there a GC directive on this issue? We have been advised of a GC Memorandum or directive, apparently issued recently, requiring a closer scrutiny of non-Board settlement. We would appreciate learning more about any such memorandum. A question was raised about the routine use of "non-admission" clauses in settlement agreements. What is GC policy or practice regarding the inclusion of such clauses?

Ans: The guidelines for settling cases are set forth in the ULP Casehandling Manual. Section 10128.5 of the Manual provides that absent unusual circumstances, the initial settlement meeting should include only the charged party and its representatives. Section 10128.7 further provides that the Regional Office "should keep the charging party apprised of the status of settlement efforts" and of course seek the charging party's agreement to the settlement as well.

Memorandum OM 07-27, "Non-Board Settlements," which issued on December 27, 2006, sets forth principles that the Regions should follow in

assessing whether to approve non-Board adjustments. This memorandum did not change policy. Its purpose was to assure uniformity of approach to settlement negotiation.

Nonadmission clauses should not be routinely incorporated in settlement agreements. A nonadmission clause may be incorporated in a formal settlement only if it provides for a court judgment. Sec. 10168, par. 10. It is Board policy that nonadmission clauses should not be included in notices. See *Independent Shoe Workers of Cincinnati, Ohio (U.S. Shoe Corp.),* 203 NLRB 783 (1973). See section 10130 CHM.

In deciding whether to accept a charged party's request that the informal or formal settlement agreement include a nonadmission clause, a Regional Director carefully exercises his/her discretion based on the individual circumstances of each case.

17. Ques: To what extent are the Regions encouraged to include special remedies in settlement agreements in appropriate cases? What are the statistics concerning settlement agreements containing special remedies? What sorts of remedies were used and in what context?

Ans: Section 10131 of the Casehandling Manual outlines specific remedies that may be appropriate in particular circumstances. For example, Section 10131.1 outlines remedies to be sought in First Contract Bargaining Cases. Our experience with those remedies is discussed in response to Question 1. infra.

18. Ques: Remedies and Compliance: As a result of the Board decisions in *Toering Electric, Oil Capitol, Grosvenor Resort* and *St. George Warehouse*, the GC issued a number of GC and OM Memoranda dealing with whether and under what circumstances back pay will be available to certain discriminatees. The Committee would appreciate a report on the impact of these decisions on the Agency, including the budgetary impact of these decision on the Regions. How are back pay entitlement investigations being conducted? What new procedures have been adopted for collecting the evidence necessary to meet the new GC burdens? What steps are being taken to advise discriminatees of their obligation to begin searching for interim employment? Are these decisions being applied retroactively to individuals terminated prior to the issuance of the pertinent decision?

Ans: An examination of discriminatees' entitlement to backpay has always been part of the compliance investigation. The Board's decisions in *Grosvenor Resort*, *Toering Electric, Oil Capitol and St. George Warehouse,* however, requires greater emphasis on compliance issues during the initial stages of case processing and regional offices are taking steps to insure that the parties and discriminates are aware of their obligations. For instance, special language is included in the docketing correspondence advising potential discriminatees who

have been discharged or refused hire of their obligation to immediately begin their search for work and to maintain records of that search.

These decisions are being applied retroactively unless it would cause a manifest injustice to the discriminatees to do so.

19. Ques: What are the statistics for cases currently pending in Advice and how do these numbers compare to previous years? What are the statistics for the length of time it is taking to process these cases as opposed to cases that do not need to be submitted? Is there any plan to decrease or increase the number of required referrals? Is there a policy or practice that parties be first notified that their case is being transmitted and outlining the specific questions being submitted?

Ans: In FY 08, the Division of Advice closed cases in a median of 20 days from their submission. This figure exceeds Advice's internal goal of returning submissions to Regional Offices within 25 days, a target that Advice has satisfied for many years. In FY 08, the Regions spent a median of 69 days to investigate cases submitted to the Division of Advice, while the median time for investigation and merit determination of all ULP charges in the field was 56 days. The additional time spent on Advice-worthy charges is a result of the relative complexity of these cases, which often present multifaceted factual and legal issues that require extensive investigation and analysis, including input by the parties to the dispute. There is no immediate plan to increase or decrease the number or type of submissions to Advice at this time. It is General Counsel policy that the parties be informed that a case has been submitted to the Division of Advice.

20. Ques: What is the Agency's experience with regard to the Full Consent Election Process? How often has it been used: What are the results of such elections? What is the status of the "joint petition" initiative that was described last year?

Ans: Since March 1, 2005, there has been one election conducted pursuant to a Full Consent Election Agreement. However, we continue to see more parties taking advantage of the "traditional consent" election procedures since the announcement of the Full Consent Election procedures. In FY 2008 there were 136 "traditional consent" election agreements across the country.

The proposed rule for the joint petition procedure was published in the Federal Register for comment. The comments received concerning this procedure are published on the Agency's website. It is anticipated that there will be no final action on this matter until there is a full Board.

21. Ques: The Committee is interested in an update apropos the Agency's

practices vis-à-vis to blocking charges. What is the most recent guidance to the Regions for blocking or refusing to block an election when charges are filed by unions, employees, or employers? How much discretion do the Regions have in this regard? Does the Office of Appeals give priority to reviewing appeals of dismissed unfair labor practice charges when an election petition is blocked?

Ans: The Blocking Charge Rule is set out in CHM sections §§11730–11734 Concurrent R (Representation) and C (ULP) Cases). Under Section 102.71 of the Board's Rules and Regulations, a party to the case has the right to seek Board review of Regional Director blocking charge decisions. The Office of Appeals gives priority to appealed cases involving the blocking of an election petition.

22. Ques: What is the Agency's current practice with regard to pre-election hearings when no issue has been identified?

Ans: Once a petition has been filed, the Region will make every effort to secure an election agreement. If an election agreement cannot be reached, the Board agent assigned to the case will attempt to secure the basic facts and potential issues before the scheduled hearing. Section 11012, Casehandling Manual (CHM), Part Two, Further Investigation. Even if no party raises an issue in dispute prior to the hearing, in the absence of a stipulation, a hearing must be convened and a party has a right to raise an issue there and introduce evidence, *Barre National, Inc.*, 316 NLRB 877 (1995). Under *Bennett Industries*, 313 NLRB 1363 (1994), if a party refuses to state a position on an issue and no controversy exists as to that issue, the party would be precluded from presenting evidence on the issue at a hearing.

23. Ques: Are representation cases being sent to other Regions for the issuance of a decision? If so, when and under what circumstances is this happening? Are the parties advised?

Ans: On occasion staffing considerations may occasion cases being sent to other Regions for drafting a decision. Unless the case is formally transferred, the originating Regional Director will issue the decision. Parties are notified of the formal transfer of a petition from one Region to another. Formal transfers occur infrequently.

24. Ques: The Committee would like to know if the Agency has seen an increase in "consultant" activity in Board cases. Is the Agency generally aware when a consultant is involved in an election or negotiations? What are the implications, if any, of the Ohio Supreme Court decision imposing ethical proscriptions on the practice of law?

Ans: The Agency is unaware of any increase or decrease in consultant activity

in Board cases. The implications of the Ohio Supreme Court's decision for practice before the NLRB are limited. First, the Ohio Supreme Court itself emphasized that its decision is limited to third-party nonattorney representatives; in other words, its decision does not affect the ability of employers or unions to represent themselves. In addition, the decision is of limited precedential value in other states because it relies on Ohio's definition of the practice of law. Finally, although the NLRB oversees the process of collective bargaining, the Agency does not regulate the drafting of collective-bargaining agreements, which is the only conduct that formed the basis for the unauthorized practice violation in *Ohio State Bar Association v. Burdzinski et al.,* 112 Ohio St.3d 107, 2006-Ohio-6511 decision.

25. Ques: Participants perceived inconsistencies in the manner in which Regions handle election objections and offers of proof in determining which objections will go to a hearing. For example, if 10 objections are filed, but offers of proof made with regard to only 2, should all 10 objections be heard or only 2? Is there or should there be an Agency-wide directive regarding the necessary evidentiary standards which must be met for an objection to go to a hearing?

Ans: The Agency standard is that a hearing shall be conducted with respect to those objections or challenges which the Regional Director concludes raise *substantial and material factual issues* (emphasis added). The Agency's Representation Case Casehandling Manual, at Sec. 11395.1, provides guidance on the application of the standard. The example provided here is not sufficiently detailed to be able to fully respond.

26. Ques: Does the Agency have a practice or policy with regard to witnesses who are no longer in the United States? How does the Agency handle this situation in both the investigative and trial stages of a case?

Ans: We have had only a few isolated incidents when witnesses to an investigation are abroad, and we have taken a case-by-case approach to those situations. In one case, witnesses to an alleged unfair labor practice relocated outside of the United States soon after the alleged incident occurred, and through the assistance of the United States Consulate Office in that country, the witnesses were interviewed in the Consulate office over the telephone. There have not been any incidents where material witnesses were no longer in the country at the trial stage.

27. Ques: We understand that the Agency is conducting a "boundary study" to determine whether the areas of regional and sub-regional offices should be adjusted based on case load. We would appreciate the opportunity for both discussion and input into the process.

Ans: The Agency is in the initial stages of its boundary study. Once we

complete the compilation and analysis of the necessary data, recommendations will be made to the General Counsel and the Board. We will, of course, seek input from the affected stakeholders prior to implementation of any recommended changes.

28. Ques: The Committee seeks greater information regarding the Next Gen Computer Project and the entire issue of e-filing, e-service, and other new web-based practice technologies. Additionally, we would appreciate the opportunity to assist in the Project.

Ans: Progress continues on the Agency's pioneering IT project to create an enterprise-wide automated case management system that will enable us to process both C and R cases electronically from the filing of a charge or petition through all stages of the administrative process and litigation to resolution and closure. We are currently running two successful pilot projects in this venture, called the Next Generation Case Management System (NxGen). The first is with two Regional Offices, Region 9, Cincinnati, and Region 10, Atlanta. The second is with the General Counsel's Office of Appeals in Headquarters. The NxGen case management system will replace eleven legacy case tracking systems when fully deployed. Because the NxGen system is built on an electronic case file, we would very much appreciate the assistance of practitioners in submitting documents to Regional Offices, the Division of Judges and the Board electronically through the Agency's website (E-file).

With respect to our E-Government initiatives, a number of efforts are in process, including:

- In February 2009, the Board extended the deadline for the E-filing of documents from close of business at the receiving office to before midnight (local time) at the receiving office on the due date. Documents filed by other means, such as mail, personal service, or fax, will continue to be subject to the Board's present rule that sets a deadline for filing at close of business of the receiving office on the due date. For the Board and General Counsel offices in Washington, D.C. the close of business is 5:00 p.m. Eastern Time. These changes apply to the offices of the General Counsel, including Regional Offices, the Division of Judges and the Board.
- We have also implemented additional steps in 2009 to reduce or eliminate technological or procedural barriers to electronic filing. These include eliminating the requirement that parties file physical copies of large documents and allowing parties to serve copies of E-filed documents on other parties by e-mail. Both are expected to save printing, mailing/delivery and paper costs.
- The Board's E-Issuance/E-Service pilot project will begin issuing Administrative Law Judge decisions electronically to registered parties starting in April 2009. This pilot, which began in August 2008, will

continue to be enhanced to allow for the delivery of additional NLRB documents securely through electronic means to parties. Parties to cases before the Board or an ALJ are encouraged to register to receive Board and ALJ decisions electronically.

- The E-Filing pilot project will be enhanced to allow users to submit a variety of online forms such as an electronic notice of appearance.

29. Ques: The Committee also would appreciate a report on the Agency's current outreach efforts. We are interested in what the Regions are doing and to what extent their efforts have been successful. What has been the budgetary impact of these efforts? The Committee again offers its assistance in these efforts.

Ans: In FY08, our Regions participated in over 525 outreach events disseminating important information about worker's rights to over 32,000 stakeholders. Regional staff provided information about the Agency and the NLRA to students, to employer/management, labor and governmental organizations, to local practitioners, and to communities at large.

With regard to students, Board agents educated students in classes at law schools, undergraduate universities and high schools. Regions also hosted students at Regional Offices in a mentoring effort and judged moot court and mock trial competitions.

Regional outreach to employer/management, labor and governmental organizations consisted of addressing human resource professionals, union stewards, state legislators, school district representatives, and state and federal agency representatives. Some of these requests came through the Speakers Bureau feature on our Agency website.

Directors and other managers in over two-thirds of our Regions attended practice and procedure meetings with local practitioners, as well as participated in ABA and local Bar-sponsored conferences and events.

Regional staff members also made substantial efforts to inform their respective communities about protected concerted activities and workers rights under the NLRA at immigrant welcome centers, women's rights centers, and workers' centers. These were sometimes performed as joint outreach activities with other federal agencies such as EEOC and DOL.

In addition, Board agents achieved broad-based communication with the public by telephone and during public television and radio broadcasts about the Act, including Spanish-language programs, at community-based events, such as the Black Expo in Indianapolis, and by drafting and disseminating 29 individualized Regional newsletters, which apprised the public of recent case activity on the national and local level and have been a window into the unique personalities of

each Regional Office. The newsletters are made available nationwide by regular and electronic mailings and publishing them on the Agency's website. A calendar of Regional outreach events is also posted on the website for public review.

Because of budgetary constraints, attendance at conferences and outreach events involving long-distance travel have unfortunately been limited. We welcome any assistance the ABA can provide regarding collaborative efforts to improve the Agency's outreach efforts, such as disseminating our Regional newsletters to your respective mailing lists and defraying fees and costs associated with ABA-sponsored events so that staff from our local Regional Offices can participate. Our National Outreach Coordinators welcome the opportunity to brainstorm with you regarding further expansion of our current outreach program.

30. Ques: What is the status of the Agency's mediation program? How many cases are referred to mediation? How long does the process generally take? What is the percentage of referred cases mediated successfully?

Ans: The Alternative Dispute Resolution (ADR) program commenced in January 2006. It covers unfair labor practice cases pending before the Board after the filing of exceptions to administrative law judges' decisions. Once exceptions are filed with the Board, the Office of the Executive Secretary sends a letter advising the parties of the availability of ADR. A request by a party to participate is kept confidential if the requestor so desires. Participation is voluntary and ADR is not conducted unless the General Counsel and respondent agree and the charging party either agrees to participate or has no objection to ADR commencing without its participation. Upon receipt of the parties' ADR agreement, the Board is notified that the case is in the ADR program and the Board will stay further processing of the case until agreement is reached or the expiration of 60 days from the first meeting with the neutral, whichever occurs first. There are no extensions of the stay beyond 60 days absent the agreement of all parties.

To date, 43 cases have been referred to ADR, three of which are currently pending in ADR. Of the remaining 40 cases, 21 settled. Generally, the cases settle within the 60-day period.

Note: On March 25, 2009 the Board decided to make the ADR program permanent.